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INFO MARITIME SECURITY COLLECTIVE

UNCLAS SECTION 01 OF 05 STATE 058579

SIPDIS

E.O. 12958: N/A

TAGS: [EWWT](#) [MARR](#) [PGOV](#) [PHSA](#) [PHUM](#) [PREL](#)

SUBJECT: AN INTERNATIONAL PIRACY COURT: NOT THE RIGHT
DIRECTION

SUMMARY

11. Department requests that Posts relay the USG position opposing efforts to create an international tribunal to prosecute piracy suspects, and seek support for the USG position. Posts should leave behind a non-paper, the text of which is provided. End summary.

OBJECTIVES

12. Participants at the Contact Group for Piracy off the Coast of Somalia (CGPCS) including Germany, Canada, Italy, the Netherlands, Egypt, and Russia, have espoused the creation of an international mechanism, such as an international or regional court, to prosecute suspected pirates. The United States opposes the creation of such a costly, time-consuming mechanism that only duplicates capacity already extant in national legal systems, and the creation of which would detract from necessary efforts to

improve our collective ability to prosecute suspected pirates in the short-term and build the necessary legal capacity in Somalia and the region in the future. Posts should relay to host governments the USG arguments against the creation of such a body, leaving behind the text of this non-paper.

¶3. Posts should encourage like-minded countries to be outspoken in their positions and to develop their own argumentation against an international mechanism. Posts should challenge proponents to share arguments for such a mechanism, and in particular to demonstrate why such a mechanism would be preferable to efforts to support national prosecutions.

¶4. When presenting the U.S. position and non-paper, Posts should make a special effort to stress that the United States remains supportive of international tribunals as a general matter, and believes that in the appropriate circumstances, they can be instrumental in achieving international justice.

¶5. Begin text.

Non-Paper: An International Piracy Court) Not the Right Direction

The question has arisen whether part of the international community's legal response to piracy should be the creation of an international piracy court or tribunal. As a general matter, the United States is supportive of international tribunals, and believes that in the appropriate circumstances, they can be instrumental in achieving

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international justice. However, there is an immediate need for effective prosecutions and the steps required to stand-up an international tribunal make it unfeasible in the short-to-medium term. This leaves a clear need for effective national prosecutions, including within the impacted region. Beyond this, however, there are several other reasons why an international piracy court is not desirable at this time.

First, an international tribunal is not appropriate for this type of crime. International tribunals typically have been created to try crimes of the most heinous nature that national jurisdictions cannot handle because government officials may be among the accused or because national governments are politically unwilling or unable to exercise jurisdiction over the accused. Often they relate to a specific and limited set of events, such as atrocities during armed conflict. These characteristics are not relevant to piracy, which is a common crime that has been with us for centuries, exists all over the world today, is subject to universal jurisdiction, and has been prosecuted traditionally and successfully in national courts.

Second, international tribunals have proven expensive to establish and operate and require a significant amount of continued oversight. Many consider that the world's limited financial resources would be put to better use in facilitating prosecution, developing prosecution capacity in regional and affected states, and in supporting efforts to build a stable government in Somalia.

Third, given the legal- and resource- intensive nature of establishing and operationalizing an international court, such an effort would likely divert energy and resources from today's very real immediate need to ensure effective national prosecutions of suspected pirates, including through building the capacity of States willing to prosecute but with specific needs for assistance. Building the capacity of States also furthers the international community's broader interest in creating legitimate and sustainable judicial systems that address all of a society's needs. If there are impediments to prosecution in national courts, those impediments should be addressed as a matter of urgency, not deferred in favor of attention to an international tribunal

that will not soon be available.

Fourth, the lengthy timeline for establishing an international court for piracy may obviate the need for such a court, as governments are actively working to ensure that the piracy problem will soon dissipate. Because of the length of time it would take to reach agreement on the need for such a court, to establish the legal framework creating it, and to operationalize it, it is not clear that once created, the number of piracy suspects to be tried would justify the existence of such a body.

Fifth, once an international court/tribunal is established, it is difficult to wind down its operations since there are

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multiple residual functions which must be carried on long after actual prosecutions finish (e.g., witness protection, sentence enforcement and review, archival maintenance). The international community is currently confronting these challenges in connection with the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

Sixth, establishment of an international court would raise numerous difficult issues, including, inter alia:

- Where would the tribunal be located? Hosting an international tribunal is not simple. It requires a significant investment of time and resources, as well as sufficient infrastructure.
- Where would suspects (and convicts) be imprisoned? Some countries have expressed the view that an international tribunal would ease the strain on national prison systems, but even if such a tribunal existed, individual nations would still need to volunteer to accept convicted persons into their correctional systems.
- How would the tribunal be constituted? Would it require a UN Security Council Resolution or international treaty and, if so, what would be the terms of that resolution/treaty?
- What would be the jurisdiction of such a tribunal? Would it be limited to cases of piracy in the Horn of Africa? If so, why? Would it be available for trial of every participant in acts of piracy, or only major offenders?

As noted above, reaching international agreement on these and related matters would take significant time and resources.

Seventh, an international tribunal, once up and running, would face both traditional and novel challenges. As a new judicial institution, every matter before it would be one of first impression, and defendants could mount challenges to the jurisdiction and legal procedures adopted by a tribunal lacking in any established case law or time-tested judicial practices.

Against the backdrop of these and other challenges, proponents of an international piracy court have the burden of demonstrating the advantages that such a court would have over national prosecutions. A systematic approach to the issue would identify current impediments to national prosecutions (as Working Group 2 of the Contact Group on Piracy off the Coast of Somalia has done) and show why such impediments would more effectively be overcome by an international court. In those cases, for example, where evidentiary deficiencies have been the reason for failure to prosecute, it does not appear that an international court would have cured the problem.

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The Alternatives

The energy and focus of the international community would be better placed on the following options for prosecution of suspected pirates:

- As noted above, affected States should favorably consider and make every effort to prosecute. Affected States include the State whose flag is flown by the attacked ship, the State(s) from which the owners of the ship in question come, and the State from which the crew or passengers come, among others.
- In particular cases, if all affected states are unable to prosecute, then the case could be prosecuted in a national court in the region where the act of piracy occurred, with appropriate enabling support.
- Additionally, favorable consideration should be given to the proposal of the Contact Group on Piracy off the Coast of Somalia to explore development of an international trust fund that could be used to help defray the expenses of national prosecutions in States willing to prosecute but in need of assistance to do so.

End text.

REPORTING DEADLINE

¶6. Post should report any reactions to this demarche by cable and by email by June 17 to PM/PPA David Foran, forandm@state.sgov.gov, 202-647-7162 and IO/UNP Joseph Fitzgerald, fitzgeraldjjo@state.sgov.gov, 202-647-2641.

BACKGROUND

¶7. Several countries, including at the CGPCS Plenary meeting in New York City on May 29, have publicly espoused the creation of an international mechanism such as an international or regional court to which states that apprehend suspected pirates could transfer them for prosecution. Germany, Italy, Canada, the Netherlands, Egypt, and Russia, have all endorsed the notion. Many states, including China, Japan, France, the UK, Greece, Sweden, and India, have, in the context of the Contact Group,s legal working group, expressed reservations and concerns about such an approach, and most recently Somalia,s Transitional Federal Government also announced opposition. Dutch FM Verhagen intends to organize a meeting in The Hague in July to discuss the structure of a putative tribunal that would operate in the region and which would convict pirates who would serve their sentences in the region, although there is some effort to discourage the Netherlands from pursuing a meeting outside of the Contact Group structure. Regardless,

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the issue will be high on the agenda of the next meeting of the legal working group of the Contact Group, likely to take place in late August in Copenhagen. The non-paper lays out the analysis and considerations that inform the USG position.
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